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In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 877

SAM FELDMAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 31–39) is reported at 299 F. 2d 914.

JURISDICTION

The judgment of the court of appeals was entered on February 28, 1962. The time for filing a petition for certiorari was extended to April 16, 1962, by order of Mr. Justice Harlan dated March 15, 1962. The petition was filed on Monday, April 16, 1962. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the district court abused its discretion in denying petitioner's motion for a mistrial on the

ground that ten of the jurors had read a newspaper article disclosing the fact that two of petitioner's co-defendants had pleaded guilty, where each juror assured the court that his determination of the case would not be influenced in any way by the newspaper article.

2. Whether, where a single indictment properly joined counts charging all defendants with violations of the Sherman Act and counts charging some defendants with violating the Hobbs anti-extortion Act, the dismissal of the Sherman Act counts after trial for failure of proof invalidated the joinder of counts under the two statutes, and required a new trial under the Hobbs Act.

STATUTES AND RULES INVOLVED

The pertinent provisions of Sections 1 and 2 of the Sherman Act, as amended, 15 U.S.C. 1 and 2, and of the Hobbs Act, 18 U.S.C. 1951, are set forth in the petition at pages 4–6. Rules 8 and 14 of the Federal Rules of Criminal Procedure are set forth in the petition at pages 6–7.

STATEMENT

On June 23, 1959, a six-count indictment was returned against eleven individuals and one corporation (10a–24a).[1] The defendants were the petitioner, Sam Feldman, President of the Newspaper and Mail Deliverers' Union; the treasurer and four business agents of that union; five officials of various compa-

[1] We have followed the method of citation used in the petition. Numbers followed by the letter "a" refer to pages of the appendix to petitioner's brief in the court of appeals. The transcript of the trial is cited as "Tr."

nies in the business of wholesale distribution of newspapers and magazines; and one of those companies, Bi-County News Corp.

The first count charged all defendants with violating Section 1 of the Sherman Act by conspiring to restrain interstate commerce in the distribution and sale of newspapers and magazines. It was charged that the means of effectuating the conspiracy included the threat of strikes to extort money from an association of newspaper distributors (Suburban Wholesalers) and the hindering and excluding actual or potential competitors of Bi-County News Corp. (10a–17a). The second count charged all the defendants, except two of the union's business agents, with a violation of Section 2 of the Sherman Act by conspiring to monopolize for Bi-County News Corp. interstate commerce in the wholesale distribution of newspapers and magazines in Nassau and Suffolk Counties, New York, by the same means as alleged in count one (17a–19a).

The third count charged three of the union's business agents with extorting $25,000 from Suburban Wholesalers in 1955 in violation of the Hobbs Act. The fourth count charged the same defendants with conspiring to commit the substantive offense charged in count three (20a–22a).

The fifth count charged that in 1957 the petitioner, the treasurer and two of the business agents of the union, and two news company officials extorted $45,000 from Suburban Wholesalers in violation of the Hobbs Act. The sixth count charged those defendants with conspiracy to commit the substantive offense charged in count five (22a–24a).

Prior to trial, one of the defendants, an officer and stockholder of Bi-County News, pleaded guilty to all counts pending against him. The remaining defendants moved to dismiss counts one and two of the indictment on the ground that they failed to state a violation of the Sherman Act. The motion was granted as to count one and denied as to count two (*United States* v. *Bitz*, 179 F. Supp. 80 (S.D.N.Y.)). On appeal, the court of appeals reversed and held that count one was sufficient to charge a violation of Section 1 of the Sherman Act (*United States* v. *Bitz*, 282 F. 2d 465 (C.A. 2)). Defendants, including petitioner, also filed pre-trial motions for severance which were denied (25a–37a).

At the opening of trial, one of the business agents of the union pleaded guilty to counts one, three and four and his case was severed for trial of the remaining counts (Tr. 31, 36). On motions of the defendants, the trial judge, while stating that there was no prejudice, empaneled a new jury (Tr. 39–42).

On the second day of the ensuing trial, petitioner brought to the court's attention a newspaper article which disclosed the fact that two of petitioner's co-defendants had pleaded guilty. (Tr. 138–141).[2] At

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[2] The article which appeared at page 5 of the *New York Daily News* of April 5, 1961, read (Tr. 140):

Jury Is Picked in Extort Trial

A jury of nine men and three women was chosen yesterday before Federal Judge Edward Weinfeld to try eight men and a magazine distributing firm on charges of extortion and violating the antitrust laws in wholesale distribution of newspapers and magazines in the metropolitan area.

petitioner's request, the jury was polled by the judge and ten jurors admitted having read the article (Tr. 141, 153–154). The trial court questioned each juror individually and was assured that the article would not influence his determination of the case, and that he would decide the case solely on the evidence received in the courtroom (Tr. 155–155a). At that time the court made the following statement (Tr. 153–154):

> Members of the jury, my attention has been directed to a newspaper article referring to this case. I think I told you last night, almost the last words I uttered before we adjourned for the day, to please bear in mind my original instruction to you in this case at the time of your selection as jurors, that, while there are only seven defendants on trial out of a total of eleven, the guilt or innocence of the defendants on trial must be decided and resolved solely and only with respect to evidence that may be submitted as against them or the lack of evidence, and even with respect to co-defendants on trial, the case of each defendant ultimately, should it be submitted to you, must be treated as if he were the sole defendant on trial, and the case resolved with respect to him on the basis only of testimony submitted as against him * * *.

Defendants included former officials of the Newspaper and Mail Deliverers Union.

Among them was Sam Feldman, 42, of 41 Dorchester Ave., Bronx, union president from May, 1956, until May, 1959.

Of the 11 defendants named originally, two pleaded guilty. On his plea, Irving Bitz of Kings Point, L.I., was sentenced to five years in prison. On Monday, Harry Waltzer, former business agent, pleaded guilty. Sentence still is to be imposed.

Petitioner then made a motion for a mistrial, which was denied (Tr. 155a–156).

At the conclusion of the government's case the court granted defense motions for dismissal of count two as to all defendants (Tr. 1863–1864), but reserved decision on motions for dismissal of count one (Tr. 1893). The court also directed verdicts of acquittal for two of the newspaper company officials and the corporate defendant on count one and two (Tr. 1866), and for the treasurer and one of the business agents of the union on counts one, two, five and six (Tr. 1840–1841, 1851). At the close of the entire case the court dismissed count one as to all remaining defendants (Tr. 2098–2099).

The evidence was submitted to the jury as to the remaining three defendants[3]—the petitioner and two of the business agents of the union (Tr. 2099). The court gave the following instruction as part of the charge to the jury (Tr. 2301–2302):

> The fact that one or more persons originally named in the indictment have pleaded guilty, that others have been acquitted by direction of the Court, or that the indictment has been severed as to still others, may not, in any respect, be considered by you for or against the defendants who remain on trial.
>
> This must play no part in your deliberations.
>
> As I have instructed you on a number of occasions, guilt is personal. Accordingly, the guilt or innocence of each defendant must be determined separately with respect to him,

[3] One of the defendants was granted a severance because of poor health and *a nolle prosequi* was entered on the charges against another.

> solely and only upon the evidence, or the lack of evidence, pertaining to him.
>
> Thus, the case of each defendant must be considered under the count wherein he is named, as if he were separately on trial.

The jury returned verdicts of guilty as to the three defendants on all counts submitted (Tr. 2363).

Petitioner made a timely motion for a new trial on the ground that he had been prejudiced by the denial of a severance (Tr. 2369–2372). This motion was denied by the court (Tr. 2377). Thereupon, the court sentenced petitioner to imprisonment for a year and a day on counts five and six, the sentences to run concurrently (Tr. 2413). On appeal, this judgment was affirmed by the Court of Appeals for the Second Circuit (Pet. App. 31–38), one judge dissenting (Pet. App. 38–39).

ARGUMENT

1. Petitioner argues that the district court committed reversible error in denying a mistrial after it had learned that members of the jury had read a newspaper article disclosing that two of petitioner's co-defendants had pleaded guilty (Pet. 14–18). It is settled, however, that the trial judge has a large discretion in determining whether a news article to which the jury was exposed was so prejudicial as to require the empaneling of a new jury. (*Marshall* v. *United States*, 360 U.S. 310, 312; *Holt* v. *United States*, 218 U.S. 245, 251). There is no showing that the court abused that discretion here.

The trial judge asked each juror individually whether the article would influence his decision, and upon receiving assurance that it would not, the court

carefully instructed the jury that the guilt or innocence of each defendant must be decided separately on the evidence heard in the courtroom. The court gave a similar instruction as part of its final charge, adding that the fact that other persons named in the indictment have pleaded guilty or been acquitted by the Court "may not, in any respect, be considered by you for or against the defendants who remain on trial" (see Statement, *supra*, p. 6).

Petitioner contends that such instructions could not remove the "prejudicial" effect of the newspaper article on the jury (Pet. 16), but this Court has repeatedly recognized that "[o]ur theory of trial relies upon the ability of a jury to follow instructions." (*Opper* v. *United States*, 348 U.S. 84, 95; *Delli Paoli* v. *United States*, 352 U.S. 232, 242). Although it was held in *Marshall* that the prejudicial effect of the newspaper articles read by the jury in that case could not be overcome by precautionary instructions from the bench, the Court stressed that it was not possible to generalize as to the situations which would require a new trial since "each case must turn on its special facts." (*Marshall* v. *United States*, 360 U.S. at 312).[4] *Marshall* involved disclosure to the jury of a prior conviction of the defendant—a type of evidence which has historically been held inadmissible precisely because of its prejudicial effect on the jury. (*Michelson* v. *United States*, 335 U.S. 469, 475–76). Here, the

[4] It has been held reversible error to emphasize a guilty plea of a co-defendant in the charge to the jury (*e.g.*, *Payton* v. *United States*, 222 F. 2d 794 (C.A.D.C.); *United States* v. *Toner*, 173 F. 2d 140 (C.A. 3)). Petitioner makes—and could make—no such claim here, however.

disclosure was not of prior acts of the petitioner but of a guilty plea by two co-defendants. In absence of special circumstances showing prejudice, such a disclosure has been uniformly held not to be grounds for granting a new trial.[5] (*United States* v. *Crosby*, 294 F. 2d 928, 948–50 (C.A. 2); *Wood* v. *United States*, 279 F. 2d 359, 363 (C.A. 8); *Davenport* v. *United States*, 260 F. 2d 591, 596 (C.A. 9), certiorari denied, 359 U.S. 909; *Richards* v. *United States*, 193 F. 2d 554, 556 (C.A. 10), certiorari denied, *sub nom. Krupnick* v. *United States*, 343 U.S. 930.) There were no special circumstances showing prejudice here. Moreover, the acquittal of five defendants at the conclusion of the government's case emphasized that the jury could not infer the guilt of all from the fact that two had pleaded guilty.

2. Petitioner also argues that since the Sherman Act counts of the indictment, which were the basis

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[5] Since *Marshall*, courts of appeals have upheld the denial of mistrials where jurors had seen newspaper accounts of the trial in which they were sitting. *E.g. United States* v. *Carlucci*, 288 F. 2d 691, 694 (C.A. 3), certiorari denied, 366 U.S. 961; *United States* v. *Vita*, 294 F. 2d 524, 527 (C.A. 2), certiorari denied on other issues, 369 U.S. 823; cf. *United States* v. *Crosby*, *supra*, at 948–950. See also *United States* v. *Coduto*, 284 F. 2d 464, 467 (C.A. 7), certiorari denied, 365 U.S. 881, rehearing denied, 366 U.S. 947.

[6] The third question raised by petitioner regarding an alleged variance between the indictment and the proof at trial (Pet. 26–29) is without merit. As the court of appeals pointed out "[i]t is apparent that the variance, such as there was, did not 'affect the substantial rights of the accused.' *Berger* v. *United States*, 295 U.S. 78, 82 (1935). The accused in the case at bar was definitely informed as to the charges against him and any doubt which might conceivably exist is satisfied by the bill of particulars which clearly sets forth that the evidence

for joinder of the defendants under Rule 8(b) of the Federal Rules of Criminal Procedure, were dismissed for lack of evidence, "the anti-trust counts of the indictment should be considered void ab initio with respect to consideration of the rights of the Petitioner for a severance" (Pet. 23). The contention is disposed of by *Schaffer* v. *United States*, 362 U.S. 511. The Court held there that dismissal of the common count which was the basis for joinder under Rule 8(b) did not automatically invalidate the joinder, and that "subsequent severance was controlled by Rule 14, which provides for separate trials where 'it appears that a defendant * * * is prejudiced * * * by such joinder for trial * * * .'" (362 U.S. at 515–16). In the present case, the district court rejected petitioner's claim of prejudice (Tr. 2370, 2377), and the court of appeals expressly found that "no exceptional circumstances indicating prejudice exist * * *" (Pet. App. 58). Petitioner has failed to show any basis in the record for reversing these determinations.[7]

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would show a demand for $65,000 from both Suburban and Morning Wholesalers of which $45,000 was paid by Suburban" (Pet. App. 35–36).

[7] There is no merit to petitioner's attempt to distinguish *Schaffer* on the ground that there the validity of the "common count linking all of the said defendants" was not challenged, while here the common Sherman Act counts were challenged on the ground that they were based "upon the Government's erroneous theory that the evidence concerning the separate 1955, and 1957 Hobbs Act violations, also constituted *per se* violations of the Anti-Trust Laws" (Pet. 23). Petitioner is correct as far as he goes: a challenge was made but was squarely rejected by the court, which held that there could be cases where a violation of the Hobbs Act would also be a violation of the Sherman Act. It dismissed the Sherman Act count

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectively submitted.

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MAY 1962.

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because "the evidence fails to support a charge of unreasonable restraint upon commerce • • •" (Tr. 2026). Since petitioner admits that the antitrust counts were not brought in bad faith by the government (Pet. 24), the only "erroneous theory" on the part of the government was failure to prove the allegations of the Sherman Act counts, which was precisely the situation in *Schaffer*.